Supreme Court, U.S.
FILED

03 583 SEP 29 2003

No.

IN THE

Supreme Court of the United States

JOSUE LEOCAL,

Petitioner,

v.

UNITED STATES ATTORNEY GENERAL, IMMIGRATION AND NATURALIZATION SERVICE,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

The court below interpreted 18 U.S.C. § 16 to include DUI with serious bodily injury as a "crime of violence"—and therefore an "aggravated felony" as defined under § 101(a)(43)(F) of the Immigration and Nationality Act ("INA")—where the statute under which Petitioner was convicted required nothing more than negligence for conviction. That ruling conflicts with decisions of other United States Courts of Appeals and with the interpretation of the Board of Immigration Appeals ("BIA" or "Board"). The question presented is as follows:

Whether, in the absence of a *mens rea* of at least recklessness with respect to the active application of force against another, DUI with serious bodily injury is a "crime of violence" under 18 U.S.C. § 16 that constitutes an "aggravated felony" under § 101 of the INA?

LIST OF PARTIES

The caption of this case contains the names of all the parties to the proceedings in the courts below. Petitioner Josue Leocal was the petitioner before the Board of Immigration Appeals and in the court of appeals. Respondents the United States Attorney General and the Immigration and Naturalization Service were the respondents before the Board of Immigration Appeals and in the court of appeals.

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Petitioner respectfully petitions this Court to issue a writ of *certiorari* to the United States Court of Appeals for the Eleventh Circuit to review its decision in *Leocal v. U.S. Attorney General*.

OPINIONS BELOW

The opinion of the court of appeals is unreported and is reproduced at App. 5a-7a, *infra*. The opinion of the Board of Immigration Appeals is unreported and is reproduced at App. 1a-4a.

JURISDICTION

The court of appeals entered its judgment June 30, 2003. This Court has jurisdiction pursuant to 28 U.S.C. § 1254.

STATUTORY PROVISIONS INVOLVED

The following statutory provisions are involved in this case. Section 16 of Title 18 of the United States Code defines "crime of violence," and it provides:

> The term "crime of violence" means --
>
> (a) an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or
>
> (b) any other offense that is a felony and that, by its nature, involves a substantial risk that physical force

against the person or property of another may be used in the course of committing the offense.

18 U.S.C. § 16.

The Florida statute under which Petitioner was convicted is Florida Statute § 316.193, which criminalizes driving under the influence. At issue is whether conviction under this statute constitutes a "crime of violence," as defined in 18 U.S.C. § 16, and therefore an "aggravated felony" as defined below in § 101 of the Immigration and Nationality Act ("INA"). Section 316.193 of the Florida statute provides, in pertinent part:

> (1) A person is guilty of the offense of driving under the influence and is subject to punishment . . . if the person is driving . . . a vehicle within this state and:
>
> > (a) The person is under the influence of alcoholic beverages . . . . * * *
>
> (3) Any person:
>
> > (a) Who is in violation of subsection (1);
> >
> > (b) Who operates a vehicle; and
> >
> > (c) Who, by reason of such operation, causes:
> > * * *
> >
> > > 2. Serious bodily injury to another, as defined in s. 316.1933, commits a felony of the third degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.

Fla. Stat. § 316.193.

Section 101 of the INA defines an "aggravated felony," conviction for which makes an alien removable. Section 101 provides in pertinent part:

> (a) As used in this chapter--

> (43) The term "aggravated felony" means--
> > (F) a crime of violence (as defined in section 16 of Title 18, but not including a purely political offense) for which the term of imprisonment at least one year;

8 U.S.C. § 1101(A)(43)(F).

STATEMENT

Petitioner seeks review of the determination by the United States Court of Appeals for the Eleventh Circuit that driving under the influence ("DUI") with serious bodily injury constitutes a "crime of violence" under 18 U.S.C. § 16. It is well established that, although federal courts lack jurisdiction to review challenges to removal orders raised by certain classes of aliens, such as those convicted of "aggravated felonies" pursuant to Immigration and Nationality Act ("INA") § 237, 8 U.S.C. § 1252(a)(2)(C), federal courts have jurisdiction to determine their own jurisdiction, including whether an underlying conviction is a "crime of violence" under 18 U.S.C. § 16 and therefore an aggravated felony for purposes of INA § 242(a)(2)(C).

The Court of Appeals for the Eleventh Circuit concluded that it did not have jurisdiction to review the Board of Immigration Appeals' decision to remove Petitioner from the United States based on his conviction for DUI with serious bodily injury because another Eleventh Circuit panel had previously decided that DUI with serious bodily injury under Florida law is a "crime of violence."

The Eleventh Circuit's decision below that DUI with serious bodily injury constitutes a "crime of violence" under § 16 is contrary to the holdings of the majority of courts of appeals that have considered the issue. It also is contrary to

the BIA's current interpretation of § 16. The disparate treatment of aliens across the United States depending on where they reside does violence to the fundamental principle that immigration laws should be applied uniformly across the country. Review by this Court is warranted because the decision below is contrary to the interpretation of the BIA and the majority of circuits that have considered the issue, and because failure to review the decision will perpetuate the incongruous treatment of aliens across the country with respect to whether they are removable for DUI offenses.

A. Factual Background

Petitioner Josue Leocal is a 47-year-old man who lived in Miami, Florida after entering the United States from Haiti in August 1980 at the age of 24. In December 1987, Mr. Leocal became a lawful permanent resident. Mr. Leocal applied for naturalization in March 1997, but was found ineligible in August 2000. Mr. Leocal is married to a U.S. citizen, and has four children.

On January 7, 2000, following a car accident in Miami-Dade County in which two individuals were injured, Mr. Leocal was arrested, and he eventually pleaded guilty to two counts of driving under the influence of alcohol and causing serious bodily injury, in violation of Fla. Stat. § 316.193(3)(c)2. Although this was Mr. Leocal's first arrest in the 19 years he had resided in the United States, the circuit court for Dade County sentenced Mr. Leocal to 2.5 years in prison on the first count and 2.5 years of probation on the second.

After serving over two years of his sentence, during which time he completed a ten-month course of treatment for alcohol abuse, Mr. Leocal was released from prison into custody of the Immigration and Naturalization Service ("INS") in April 2002. On November 18, 2002, the INS removed Mr. Leocal to Haiti without notifying his counsel.

B. The Board of Immigration Appeals Decision

On November 22, 2000, Mr. Leocal received a notice to appear charging him as removable pursuant to INA, § 237(a)(2)(A)(iii) for having committed an "aggravated felony" as defined in INA § 101(a)(43)(F). The removal proceeding was based on Mr. Leocal's Florida conviction for DUI with serious bodily injury, Fla. Stat. § 316.193, which the INS claimed constituted a "crime of violence" as defined in 18 U.S.C. § 16. This "crime of violence" charge was the only charge contained in the notice to appear and the only asserted basis for Mr. Leocal's removal. App. 2a, 5a.

On October 16, 2001, an immigration judge ordered Mr. Leocal's removal to Haiti. In doing so, the immigration judge relied on *Le v. Attorney General*, 196 F.3d 1352 (11th Cir. 1999) (per curiam), in which the Eleventh Circuit appeared to defer to the Board's former interpretation of 18 U.S.C. § 16 that all DUI offenses are "crimes of violence" as set forth in *Matter of Puente*, Int. Dec. 3412 (BIA 1999), *withdrawn by Matter of Ramos*, 23 I. & N. Dec. 336 (BIA Apr. 4, 2002) (en banc). Mr. Leocal filed a timely notice of appeal to the Board on November 5, 2001. On April 24, 2002, the Board affirmed the immigration judge's decision and dismissed the appeal. Because of a clerical error, the decision was never served on Mr. Leocal or his counsel.

Prior to receiving notice that the Board already had issued its decision in the present case, counsel for Petitioner filed a supplemental brief arguing that the Board's recent decision in *Matter of Ramos*, 23 I. & N. Dec. 336 (BIA Apr. 4, 2002) (en banc), which withdrew the Board's former interpretation of § 16 as set forth in *Puente*, supported the conclusion that Mr. Leocal's Florida conviction was not a "crime of violence." On August 29, 2002, the Board reopened Mr. Leocal's case, vacated its April 24, 2002 decision, and issued a new decision, again affirming the

immigration judge's finding of removability. The Board reasoned that although *Ramos* supported Mr. Leocal's position, the Board nevertheless had to defer to the Eleventh Circuit's decision in *Le* because Mr. Leocal's case arose within the Eleventh Circuit. The Board thus deferred to *Le*, even though the Eleventh Circuit in *Le* itself had appeared to defer to the Board's now-rejected interpretation of § 16.

C. The Court of Appeals' Decision

Mr. Leocal petitioned the United States Court of Appeals for the Eleventh Circuit for review of the BIA's decision. The Eleventh Circuit dismissed the petition, agreeing with the government's argument that the court lacked jurisdiction over Mr. Leocal's case under the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009 (Sept. 30, 1996), which limits judicial review of removal orders. App. 5a, 7a.

In dismissing Mr. Leocal's petition for review, the Eleventh Circuit held that its previous panel decision in *Le* was controlling despite the Board's new interpretation in *Ramos* of § 16 in the context of DUI cases, and despite the fact that *Le*, by its terms, had appeared to defer to the Board's now-withdrawn interpretation of § 16. Petitioner respectfully submits that, by incorrectly concluding that the court's prior decision in *Le* had decided that DUI offenses are "crimes of violence" under § 16, the Eleventh Circuit has perpetuated a significant split among the federal courts of appeals that has and will continue to undermine the uniform application of the immigration laws in the United States.

REASONS FOR GRANTING THE WRIT

This case squarely presents a question of substantial importance in the context of the immigration laws: whether a conviction for DUI with serious bodily injury (which

requires a *mens rea* of no more than negligence) constitutes a "crime of violence" under 18 U.S.C. § 16, a removable offense. The decision of the Eleventh Circuit is in direct conflict with the majority of appellate courts that have considered whether DUI offenses are "crimes of violence" absent a *mens rea* of at least recklessness with respect to the active application of force against another. The Eleventh Circuit's position also conflicts with the BIA's current interpretation of § 16 as articulated in *Ramos*. In light of the "strong interest in ensuring that aliens receive uniform treatment nationwide," this Court should issue a writ of certiorari to eliminate the incongruous treatment of aliens in different courts under the INA. *Ramos*, 23 I. & N. Dec. at 368.

I. THE DECISION BELOW PERPETUATES A SIGNIFICANT SPLIT AMONG THE CIRCUIT COURTS OF APPEALS

The United States Court of Appeals for the Eleventh Circuit held that it did not have jurisdiction to hear the Petitioner's appeal because in *Le v. Attorney General*, 196 F.3d 1352, 1354 (11th Cir. 1999), another panel of the Eleventh Circuit had previously found that DUI offenses qualify as "crimes of violence" under 18 U.S.C. § 16. App. 7a.

In so deciding, the Eleventh Circuit relied on its earlier decision in *Le* to conclude that it had previously interpreted § 16 as encompassing DUI offenses. In fact, as reflected by the way the court in *Le* framed the issue before it, as well as its own articulation of the standard of review that it applied, the court in *Le* deferred to the Board's now-

withdrawn interpretation of § 16 rather than deciding the issue itself. *See Le*, 196 F.3d at 1353-54.[1]

With the decision in this case, the Eleventh Circuit joined the minority of the circuits that have considered the issue. The majority of circuits to have considered the issue, by contrast, have concluded that DUI offenses are not "crimes of violence" absent a *mens rea* of at least recklessness with respect to the active application of force against another. The Eleventh Circuit's position also conflicts with the BIA's current position on this issue. *See Matter of Ramos*, 23 I. & N. Dec. 336, 346-47 (BIA Apr. 4, 2002); *United States v. Trinidad-Aquino*, 259 F.3d 1140,1145-46 (9th Cir. 2001); *Dalton v. Ashcroft*, 257 F.3d 200, 205-06 (2d Cir. 2001); *Bazan-Reyes v. INS*, 256 F.3d 600, 609-611 (7th Cir. 2001); *United States v. Chapa-Garza*, 243 F.3d 921, 926-27 (5th Cir. 2001).

A. The Majority Of Courts And The BIA Have Correctly Concluded That The "Use" of Force Against Another Requires The Active Application Of Force Against Another

By its terms, a "crime of violence" under § 16 must have an element of either "*use*, attempted *use*, or threatened *use* of physical force," against another, 18 U.S.C. § 16(a) (emphasis added), or the felony must present "a substantial risk that physical force...may be *used*," against another, *id.* at § 16(b) (emphasis added). Therefore, under either § 16(a)

[1] In his appeal to the Eleventh Circuit, Petitioner argued that the Eleventh Circuit had not independently decided this issue because the *Le* court had deferred to a repudiated BIA interpretation of § 16. The Eleventh Circuit disagreed, holding that it was bound by the *Le* court's determination of the issue.

or (b), Petitioner is only removable if his crime involved the element or risk of "use" of force against another.

The majority of courts that have addressed the question have held that DUI offenses do not qualify as "crimes of violence" under § 16 because they do not involve the volitional "use" of force that is required under both subsections of the statute. Rather, DUI offenses involve accidental results, rather than volitional actions amounting to the "use" of physical force or the risk that force will be "used", as those words are commonly understood in the English language. *See United States v. Trinidad-Aquino*, 259 F.3d 1140, 1146 (9th Cir. 2001) (deciding that DUI with bodily injury is not a "crime of violence" under either § 16(a) or § 16(b) because DUI offenses do not involve the "conscious disregard of potential physical impact on someone or something," as required for the "use" of force under § 16, as opposed to a "non-volitional negligence as to that impact"); *Bazan-Reyes v. INS*, 256 F.3d 600, 611 (7th Cir. 2001) (concluding that DUI offenses, including *homicide* involving intoxicated use of a vehicle, do not qualify as "crimes of violence" because the "use" of force language in both § 16(a) and § 16(b) refers to *intentional* physical force); *United States v. Chapa-Garza*, 243 F.3d 921, 927 (5th Cir. 2001) (concluding that DUI offenses are not "crimes of violence because they do not involve the "use" of force: "That section 16(b) refers only to that physical force that may be used to perpetrate the offense is in harmony with its requirement that the offender *intentionally* use the force against the person or property of another." (emphasis added);[2] *Dalton v. Ashcroft*, 257 F.3d 200, 207-08

[2] In a later sentencing guidelines case involving a provision that contained language similar to § 16(a), the Fifth Circuit held that a Texas statute's "requirement that the offender 'cause [] serious bodily injury' [as an element of an intoxication assault offense not involving DUI] encompasses a requirement that the offender use force to cause that injury." *United States v. Vargas-Duran*, 319 F.3d 194, 196-97 (5th Cir.

(2d Cir. 2001) (similar); *see also United States v. Parson*, 955 F.2d 858, 866 (3d Cir. 1992) (*dictum*). The majority of courts that have considered this issue have concluded that a DUI offense does not implicate the "use" of force against another, or the risk that force will be "used" against another, because DUI offenses do not require a *mens rea* of at least recklessness with respect to the active application of force against another. These courts therefore have held that DUI offenses do not qualify as "crimes of violence" for which aliens, such as Petitioner, can be removed under the "aggravated felony" provisions of the INA.

The BIA likewise has agreed that, for a DUI offense to constitute a "crime of violence," the DUI offense must involve a *mens rea* of at least recklessness with respect to the active application of force against another. *See Ramos*, 23 I. & N. Dec. 336 at 346-47.[3] Under the position of the

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2003). The court did not attempt to reconcile its holding with its analysis in *Chapa-Garza*, under which the Fifth Circuit addressed § 16(b) and explicitly recognized that the "use" of force, as commonly understood, refers to intentional conduct rather than the accidental causing of injury. *Chapa-Garza*, 243 F.3d at 926. Thus, *Vargas-Duran* depends on the fictional premise that the word "use" in U.S.S.G. §2L1.2 and 18 U.S.C. § 16(a) means something different from the word "use" in 18 U.S.C. § 16(b). The Fifth Circuit is tentatively scheduled to rehear *Vargas-Duran* en banc in late September, 2003.

[3] The Eleventh Circuit stated in *Le* that it had to defer to the Board's interpretation of § 16 if it was reasonable. *See Le*, 196 F.3d at 1353; *see also Chevron U.S.A, Inc. v. Natural Res. Def. Counsel, Inc.*, 467 U.S. 837, 843 (1984). In 1999, the BIA determined that all DUI offenses are "crimes of violence" under § 16. *See Matter of Puente*, Int. Dec. 3412 (BIA 1999) *withdrawn by Matter of Ramos*, 23 I. & N. Dec. 336 (BIA Apr. 4, 2002) (en banc). In 2002, however, the BIA renounced its previous interpretation of DUI offenses under §16, distinguishing "active violence" that requires volition from "accidental force," which does not satisfy §16's "use of force" requirement. *Ramos*, 23 I. & N. Dec. at 346. Thus, to the extent the Eleventh Circuit in *Le* did not independently interpret § 16, the court in the present case should have deferred to the BIA's interpretation of § 16 in *Ramos*. To the extent that the Eleventh

majority of the courts of appeals that have interpreted § 16, as well as the Board's interpretation of § 16, Petitioner's DUI conviction is not a "crime of violence" that should render him removable, nor should it deprive the federal courts of appeals of jurisdiction, because the Florida statute under which he was convicted requires nothing more than a *mens rea* of negligence for conviction. *State v. Hubbard*, 751 So.2d 552, 562-63 (Fla. 1999) (determining whether conviction for DUI *manslaughter* under Fla. Stat. § 316.193 requires a showing of negligence or is a strict liability offense); *Ursu v. INS*, 20 Fed. Appx. 702, 2001 WL 1182409 (9th Cir. Oct. 5, 2001) (noting that a person can violate Fla. Stat. 316.193(3) "by acting with a *mens rea* of negligence.").

In reaching their conclusions regarding the interpretation of § 16, the majority of courts and the Board properly have focused on the "use" of force language that is the crux of both § 16(a) and § 16(b). *See Trinidad-Aquino*, 259 F.3d at 1145 (analyzing § 16(a) and (b) in case involving DUI involving bodily injury); *Bazan-Reyes*, 256 F.3d at 606 (analyzing § 16(a) and (b) as applied to various DUI offenses, including DUI homicide); *Chapa-Garza*, 243 F.3d at 927 (analyzing § 16(b)); *Dalton*, 257 F.3d at 204-05 (analyzing § 16(b)); *see also Parson*, 955 F.2d at 866 (analyzing § 16(a)). These courts and the Board have correctly determined that, by requiring the "use" of force or the risk that force be "used" against another, both sections require more than the accidental causation of injury. *See Trinidad-Aquino*, 259 F.3d at 1145; *Bazan-Reyes*, 256 F.3d at 606; *see also Parson*, 955 F.2d at 866 (*dictum*).

Circuit in *Le* independently interpreted § 16 in *Le*, Petitioner respectfully submits that the Eleventh Circuit's interpretation of § 16 is plainly wrong when evaluated against the explicit "use . . . against" language in § 16 and the correct interpretations of § 16 by the other courts of appeals and the BIA.

The United States Court of Appeals for the Seventh Circuit explained in interpreting § 16(a), that "the word 'use' requires *volitional* conduct" because "[a]lthough a conviction for homicide by intoxicated use of a vehicle requires that the offender actually hit someone, it does not require that he *intentionally* used force to achieve that result." *Bazan-Reyes*, 256 F.3d at 609 (emphasis added). Similarly, in discussing § 16, the United States Court of Appeals for the Ninth Circuit noted, "[i]n ordinary, contemporary, and common parlance, the 'use' of something requires a *volitional* act." *Trinidad-Aquino*, 259 F.3d at 1145 (emphasis added) (holding that a conviction for DUI with bodily injury under a California statute, which requires no more than a *mens rea* of negligence, does not constitute a "crime of violence" under § 16).

In addressing § 16(b), courts have reached similar conclusions that DUI offenses do not qualify as "crimes of violence," because the risk of an accident occurring while a person drives under the influence does not satisfy § 16(b)'s requirement that there be a substantial risk that force may be "used" "against" another.

As it had with § 16(a), the Seventh Circuit in *Bazan-Reyes v. INS*, 256 F.3d 600 (7th Cir. 2001), held that even a DUI offense that resulted in a death did not qualify as a "crime of violence" under § 16(b). The Seventh Circuit concluded that "the language of § 16(b) simply does not support a finding that a risk that one object will apply force to another is enough to constitute a crime of violence." *Id.* at 611. Rather, "§ 16(b) only applies when the nature of an offense is such that there is a substantial likelihood that the perpetrator will *intentionally* employ physical force against another's person or property." *Id.* (internal quotation omitted and emphasis in original); *see also Chapa-Garza*, 243 F.3d at 925.

In *Dalton v. Ashcroft*, 257 F.3d 200 (2d Cir. 2001), the Second Circuit came to the same conclusion regarding the "risk" referred to in § 16(b). The court found that "the language of § 16(b) fails to capture the nature of the risk inherent in drunk driving. This risk is, notoriously, the risk of an ensuing accident; it is not the risk that the driver will 'use physical force' in the course of driving the vehicle." *Id.* at 206.

B. The Minority Position Completely Ignores The "Use . . . Against" Parlance In § 16, Or Conflates The Causation of Injury With The "Use" Of Force

The courts that have taken the minority position have ignored the crucial "use" language entirely, or have improperly conflated the causation of injury with the "use" of force required by the statute. The Eleventh Circuit in *Le*, for example, did not engage in "any analysis of whether the 'use . . . against' language requires a volitional act." *Trinidad-Aquino*, 259 F.3d at 1146; *see Le*, 196 F.3d at 1353-54.

Similarly, the Eighth Circuit relied on its previous decision in *United States v. Moore*, 38 F.3d 977, 979 (8th Cir. 1994) to conclude that DUI accidents resulting in death qualify as "crimes of violence." *Omar v. INS*, 298 F.3d 710, 716 (8th Cir. 2002). By focusing on the fact that criminal vehicular homicide "always result[s] in another's death," *Omar*, 298 F.3d at 720, however, the court in *Omar* inappropriately confused the *consequences* of the alien's act with the alien's underlying *conduct*. The court in *Omar* thus improperly "equate[d] the phrase 'risk that physical force may be used' with language Congress did not employ in § 16(b), 'risk that injury may occur.'" *Omar*, 298 F.3d at 722 (Heaney, C.J., dissenting); *see also Jobson v. Ashcroft*, 326 F.3d 367, 375 (2d Cir. 2003) (recognizing that "simply relying on the fact of the resulting harm conflates the risk of

use of force with the risk of physical injury, which is not consistent with the language of section 16(b)").[4]

In sum, the Eleventh Circuit's decision in the present case improperly ignores the "use . . . against" language" that is the crux of § 16, and upon which the majority of courts have focused to conclude that DUI offenses are not "crimes of violence" absent a *mens rea* of at least recklessness with respect to the active application of force against another. In so doing, the Eleventh Circuit has exacerbated a split in the circuits and has taken a position that is squarely at odds with the well reasoned decisions of the BIA and the majority of courts to have addressed the issue.

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[4] Before the en banc Board decided *Ramos* in 2002, the Tenth Circuit, in *Tapia Garcia v. INS*, 237 F.3d 1216, 1221 (10th Cir. 2001), deferred to the BIA's pre-*Ramos* interpretation of § 16 and held that DUI satisfies § 16(b). The Tenth Circuit interpreted § 16(b) in reliance on cases addressing a Sentencing Guidelines provision that the Tenth Circuit incorrectly found to be "similar to that of 18 U.S.C. § 16(b)." *Id.* at 1222. Section 4B1.2(a)(2) of the Guideline provision, which the Tenth Circuit invoked, differs in a critical respect from § 16(b) because it does not include the key term "use"—unlike § 16(b), § 4B1.2(a)(2) requires only a risk of "physical injury to another." *See Tapia Garcia*, 237 F.3d at 1222-23 & n.6. Other courts have recognized that § 16(b) and § 4B1.2(a)(2) are not interchangeable and have squarely rejected the Tenth Circuit's position: "Contrary to the government's assertion that the language of [the sentencing guidelines provision] and § 16(b) are substantially similar, a side-by-side comparison reveals significant differences between the language of the two provisions." *Bazan-Reyes*, 256 F.3d at 610; *accord Chapa-Garza*, 243 F.3d at 925; *Parson*, 955 F.2d at 865-66; *cf. Dalton*, 257 F.3d at 208 n.9 ("[w]e remain to be persuaded by the [*Tapia Garcia*] court's reasoning").

II. THE FREQUENTLY-RECURRING QUESTION PRESENTED IN THIS CASE HAS EXCEPTIONAL PUBLIC IMPORTANCE FOR THE UNIFORM NATIONAL APPLICATION OF IMMIGRATION LAWS

The circuit split perpetuated by the Eleventh Circuit's decision below has widespread policy implications that severely undermine "the strong interest in ensuring that aliens receive uniform treatment nationwide." *Ramos*, 23 I. & N. Dec. at 346. Allowing the circuits to enforce disparate interpretations of § 16 as it applies to DUI offenses will subject permanent resident non-U.S. citizens, such as Petitioner, to a rule of law based on geographic happenstance. To allow an alien's rights to depend on the fortuity of where he or she lives would contradict the "important policy considerations [that] favor applying a uniform federal standard in adjudicating and determining the consequences of a conviction under the [INA]". *In re Crammond*, 23 I. & N. Dec. 9 (BIA 2001).

The extent to which geographic fortuity determines the rights of aliens affected by the application of § 16 to a DUI offense is crystallized by a comparison of how the Ninth and Eleventh Circuits have, for purposes of § 16, treated convictions differently under the *same* Florida statute. As noted, the Eleventh Circuit has held that a conviction for DUI with serious bodily injury under Fla. Stat. § 316.193(3)(c)2 constitutes a "crime of violence" under § 16. By contrast, the Ninth Circuit has held that a conviction for DUI *manslaughter* under the same Florida statute (Fla. Stat. § 316.193(3)) is not a "crime of violence" under § 16. *Ursu*, 20 Fed. Appx. at 704-05, 2001 WL 1182409 at *1. In short, had Petitioner happened to live in California, rather than Florida, the INS could not have instituted removal proceedings based on the same underlying conduct. But, because Petitioner lived in Florida, within the

Eleventh Circuit, the INS has already removed him from the country and has separated from his family, perhaps permanently.

A decade ago, the Eleventh Circuit articulated the need for uniformity in the application of immigration laws: "The laws that we administer and the cases we adjudicate often affect individuals in the most fundamental ways. We think that all would agree that to the greatest extent possible our immigration laws should be applied in a uniform manner nationwide . . . ." *Jaramillo v. INS*, 1 F.3d 1149, 1155 (11th Cir. 1993).

Other circuits have concurred in the Eleventh Circuit's recognition of the importance of this matter. *See, e.g., Sareang Ye v. INS*, 214 F.3d 1128, 1132 (9th Cir. 2000) ("We have repeatedly recognized that the immigration laws should be applied uniformly across the country, without regard to the nuances of state law"); *Moon Ho Kim v. INS*, 514 F.2d 179, 180-81 (D.C. Cir. 1975) (concluding that the "legislative history of the [INA] and the plethora of definitions incorporated in it . . . leave little doubt that Congress was seeking uniformity").

Congress has also recognized the importance of uniformity in the application of immigration laws. In the Immigration Reform and Control Act of 1986, Congress articulated the need for uniformity: "It is the sense of the Congress that . . . the immigration laws of the United States should be enforced vigorously and uniformly." Immigration Reform and Control Act of 1986, Pub. L. No. 99-603 § 115, 100 Stat. 3359, 3385 (1986).

In the face of the long-standing, fundamental policy of ensuring uniform application of the immigration laws and the number of aliens likely affected by the split of authority on the question presented, Petitioner respectfully submits that this Court should resolve the clear split among the circuits regarding whether convictions for DUI offenses

qualify as "crimes of violence" under § 16 and, thus, subject the alien to being removed. Only when this happens will the long-standing and fundamental policy of ensuring uniform application of the immigration laws be vindicated. This fact underscores the public importance of the question presented in this case.

CONCLUSION

For the reasons stated, *certiorari* should be granted.

Respectfully submitted.

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APPENDIX

APPENDIX

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U.S. Department of Justice
Executive Office for Immigration Review
Falls Church, Virginia 22041

Decision of the Board of Immigration Appeals

File: A24 665 605 - Orlando Date: AUG 2 9 2002

In re: JOSUE LEOCAL

IN REMOVAL PROCEEDINGS

MOTION

ON BEHALF OF RESPONDENT:
Jeffrey S. Bucholtz, Esquire,
Jeffrey T. Tao, Esquire
KING & SPALDING
1730 Pennsylvania Avenue, N.W.
Washington, DC 20006

CHARGE:

Notice: Sec. 237(a)(2)(A)(iii), I&N Act [8 U.S.C. § 1227(a)(2)(A)(iii)] - Convicted of aggravated felony

APPLICATION: Reopening

By order dated April 24, 2002, this Board summarily affirmed the Immigration Judge's decision, dated October 16, 2001, finding the respondent removable as charged, denying his application for withholding of removal under section 241(b)(3) of the Immigration and Nationality Act, denying his application for protection under Article 3 of

the Convention Against Torture (`the Convention"), 8 C.F.R. §§ 208.16-18 (2002), and ordering him removed to Haiti. Due to exceptional circumstances, however, we deem it appropriate to reopen the respondent's removal proceedings on our own motion, pursuant to 8 C.F.R. § 3.2(a).[1] Accordingly, we will vacate our April 24 decision and reinstate the respondent's appeal. We will also grant the respondent's motion to accept supplemental brief. The appeal will be dismissed.

As a threshold matter, we will address the respondent's challenge to the Immigration Judge's conclusion that he is removable as an alien convicted of an aggravated felony. On October 30, 2000, the respondent was convicted in the Circuit Court of Dade County, Florida, of the offense of driving under the influence with serious bodily injury, in violation of section 316.193(3)(c)(2) of the Florida Statutes, a third-degree felony for which he was sentenced to a 2'/2-year term of imprisonment. *Exh.* 2. On the basis of this offense, the Immigration and Naturalization Service charged the respondent with removability as an alien convicted of an aggravated felony. Section 237(a)(2)(A)(iii) of the Act. The Immigration Judge sustained the charge of removability. We affirm.

The United States Court of Appeals for the Eleventh Circuit, in whose jurisdiction this proceeding arises, holds that the Florida offense of driving under the influence with

[1] Due to a clerical error, our April 24, 2002, decision was not served upon the respondent in the manner prescribed by 8 C.F.R. § 3.1(f). We are satisfied that this error materially prejudiced the respondent, warranting sua sponte reopening. Because we have reopened the respondent's removal proceedings sua sponte, his July 12, 2002, motion seeking re-issuance of our April 24 order is denied as moot.

serious bodily injury is a "crime of violence" under 18 U.S.C. § 16(a) and an aggravated felony under section 101(a)(43)(F) of the Act. *Le v. U.S. Attorney General,* 196 F.3d 1352 (11th Cir. 1999). Because the respondent was convicted under the identical statute at issue in *Le,* we conclude that *Le* is controlling authority in this case.

We are unpersuaded by the respondent's argument, advanced in his supplemental appellate brief, that *Le* has been superseded, or at least rendered distinguishable, by this Board's recent precedent decision in *Matter of Ramos,* 23 I&N Dec. 336 (BIA 2002), where we held that the Massachusetts offense of driving under the influence of intoxicating liquor was not an aggravated felony. We clearly stated in *Matter of Ramos* that we would "follow the law of the circuit in those circuits that have addressed the question whether driving under the influence is a crime of violence." Id. at 346-47. We made this statement because the meaning of the term "crime of violence" under 18 U.S.C. § 16 is a matter of federal criminal law, and we have long recognized our obligation to defer to circuit court interpretations of provisions of federal criminal law. *Matter of Yanez,* 23 I&N Dec. 390, 396-97 (BIA 2002); *Matter of Anselmo,* 20 I&N Dec. 25 (BIA 1989). Thus, the circuits need not defer to our reading of 18 U.S.C. § 16. *Adams Fruit Co., Inc. v. Barrett,* 494 U.S. 638 (1990) (explaining that deference does not extend to an agency's interpretation of a judicially enforceable portion of a statute). Because we lack authority to unilaterally modify the law of the Eleventh Circuit as it relates to federal criminal statutes such as 18 U.S.C. § 16, we will follow *Le* and affirm the Immigration Judge's finding of removability.

We also affirm the Immigration Judge's conclusion that the respondent failed to satisfy his burden of proving eligibility for withholding of removal under section

241(b)(3) of the Act or protection under the Convention. Specifically, the respondent failed to demonstrate either that it is more likely than not that his life or freedom will be threatened in Haiti on account of a protected ground, or that he will more likely than not be tortured in Haiti by or with the consent or acquiescence of a public official acting in an official capacity. 8 C.F.R. §§ 208.16(b), 208.16(c), 208.18(a) (2002). Because we agree with the Immigration Judge's decision denying the respondent's requests for withholding and deferral of removal on the merits, we need not decide whether the respondent's conviction for an aggravated felony constitutes a "particularly serious crime" under section 241(b)(3)(B)(ii) of the Act, so as to render him ineligible for withholding of removal.

Accordingly, the following orders shall be issued.

ORDER: This Board's April 24, 2002, decision is vacated, and the removal proceedings are reopened pursuant to 8 C.F.R. § 3.2(a).

FURTHER ORDER: The respondent's motion to accept supplemental brief is granted.

FURTHER ORDER: The respondent's appeal is dismissed, and the respondent is ordered removed to Haiti.

/s Kevin A. Ohlson

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 02-14992
Non-Argument Calendar

Agency Docket No. A24-665-605

JOSUE LEOCAL,

Petitioner,

versus

U.S. ATTORNEY GENERAL,
IMMIGRATION AND NATURALIZATION
SERVICE,

Respondents.

On Petition for Review of A Final Decision of
the Board of Immigration Appeals

Before ANDERSON, BIRCH, and CARNES, Circuit Judges.

PER CURIAM:

Josue Leocal petitions for review of the Board of Immigration Appeals' ("BIA's") final removal order, entered August 29, 2002. The BIA ordered Leocal removed as an aggravated felon, finding that his conviction under Fla. Stat. § 316.193(3)(c)2 for driving under the influence ("DUI") causing serious bodily injury qualifies as a "crime of violence" under 18 U.S.C. § 16. The government, arguing that we lack jurisdiction, moved to dismiss the petition. We agree.

We review our subject-matter jurisdiction de novo. See Brooks v. Ashcroft, 283 F.3d 1268, 1272 (11th Cir. 2002).

As Leocal's removal proceedings commenced in 2000, the permanent rules of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009 (Sept. 30, 1996) ("IIRIRA") govern his petition for review. See e.g., Brooks, 283 F.3d at 1272, n. 4 (The IIRIRA applies to removal proceedings initiated after April 1, 1997). Under the IIRIRA, judicial review of removal orders is more limited than it had been under the Immigration and Nationality Act ("INA"). 8 U.S.C. § 1252(a)(2)(C); See Calcano-Martinez v. Immigration & Naturalization Serv., 533 U.S. 348, 350, 121 S.Ct. 2268, 2270 (2001); Brooks, 283 F.3d at 1272. Given the limits of § 1252(a)(2)(C), we retain jurisdiction only to determine whether Leocal is "(1) an alien (2) who is removable (3) based on a conviction for an offense enumerated in the statute."[1] Galindo-Del Valle v. Attorney General, 213 F.3d 594, 598 (11th Cir. 2000), cert. denied, 533 U.S. 949 (2001). Among those offenses enumerated in the statute is 8 U.S.C. § 1227(a)(2)(A)(iii), which allows for removal of an alien convicted of an aggravated felony after admission into the United States. Thus, if Leocal is an alien who is removable based on an aggravated felony conviction, § 1252(a)(2)(C) divests us of jurisdiction to review the removal order. Leocal does not dispute that he is an alien, so we turn to the question of whether his conviction renders him removable as an aggravated felon.

The INA defines the term "aggravated felony" as "a crime of violence (as defined in section 16 of Title 18, but

[1] Notwithstanding the jurisdictional bar in § 1252(a)(2)(C), we retain jurisdiction to consider "substantial constitutional issues" arising out of the alien's removal proceedings. See Brooks, 283 F.3d at 1273. Leocal does not raise any constitutional issues on appeal.

not including a purely political offense) for which the term of imprisonment is at least one year." 8 U.S.C. § 1101(a)(43)(F). Since Leocal received a 2 1/2 year prison sentence, the parties have focused on whether his conviction under Fla. Stat. § 316.193(3)(c)2 was for a "crime of violence" as defined by 18 U.S.C. § 16. In Le v. United States Attorney Gen., 196 F.3d 1352, 1354 (11th Cir. 1999), a panel of this Court squarely held that it is.

"[I]t is the firmly established rule of this Circuit that each succeeding panel is bound by the holding of the first panel to address an issue of law, unless and until that holding is overruled en banc, or by the Supreme Court." United States v. Hogan, 986 F.2d 1364, 1369 (11th Cir. 1993). Accordingly, Leocal's arguments as to the wisdom of the Le decision in light of BIA's new interpretation and the rulings of our sister Circuits are unavailing. Further, Leocal's arguments that we are not bound by Le because that panel deferred to the BIA's old interpretation are based on a misreading of Le. The Le Court did say that it would review the issue de novo but defer to a reasonable interpretation of the BIA. 196 F.23d at 1353-54. However, the Court's language and analysis clearly demonstrate that it made a binding, de novo determination that a DUI that causes serious bodily injury to another is a crime of violence. Id. at 1354.

We are divested of jurisdiction to review Leocal's removal order.

DISMISSED.